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9 Attorneys for BRIAN WAYNE WENDT

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 vs.

16 JONATHAN JOSEPH NELSON, et al.,

17 Defendants.
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Case No. CR-17-00533-EMC

**DECLARATION OF COUNSEL IN
SUPPORT OF MOTION TO
EXCLUDE OR LIMIT THE
TESTIMONY OF FBI OR OTHER
EXPERT WITNESSES TESTIFYING
ABOUT CELL PHONE
COMMUNICATIONS AND
LOCATIONS BASED ON
HISTORICAL CELL CALL DETAIL
RECORDS AND PROPRIETARY
MAPPING SOFTWARE [DAUBERT
AND F.R.E. 403]; MOTION FOR
EVIDENTIARY HEARING
[EXHIBITS ATTACHED]**

Date: March 2, 2021

Time: 9:00AM

**Dept: The Honorable Edward M. Chen
District Court Judge**

25 I, John T. Philipsborn, declare that:

26 1. Martín A. Sabelli and I represent Brian Wendt.

27 2. I drafted the Memorandum in support of this Motion, assisted by Mr.

28 Sabelli. I also consulted with several other lawyers representing Mr. Wendt's co-

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1 defendant's who made suggestions about various matters. I am informed and believe that
2 most of the defense lawyers in this case plan on joining in Mr. Wendt's arguments and
3 objections. Thus far, as of January 29, 2021, I believe that only one lawyer has said that
4 he does not intend to join in the objections.

5 3. In the course of the drafting process, I quoted from a number of reported
6 cases. I believe that I have accurately quoted the various passages contained in the
7 appended Memorandum.

8 4. I also cited literature of various kinds pertinent to cell phone evidence, and
9 I believe that that literature was accurately cited and quoted. Appended here, the Court
10 will find true and correct copies of three of the documents that Mr. Sabelli and I make
11 reference to, one an article from Aaron Blank, whose article "The Limitations and
12 Admissibility of Using Historical Cellular Site Data to Track the Location of a Cellular
13 Phone" is appended here, copied from the original. Aaron Blank's article is appended
14 here as Exhibit B.

15 5. I also accessed, via the internet, an excerpt from a text that is published by
16 California's CEB, which is a joint venture enterprise between the University of California
17 and the California State Bar. That excerpt deals with NELOS, a record that is generated
18 by AT &T. The excerpt is attached as Exhibit A. I have cowritten and contributed to
19 several publications of CEB and am personally familiar with many of the publications put
20 out by CEB covering criminal law practice, as well as issues in scientific evidence. CEB
21 also publishes various information sheets. I am informed and believe that I have copied
22 text from a genuine CEB publication on aspects of cell phone analysis, covering the topic
23 of NELOS records.

24 6. In the text I have quoted from a 2017 book from Kevin Metcalf titled
25 *Cellphone Investigation Series: Preparing, Analyzing, and Mapping AT&T Records*. I
26 believe that I have accurately quoted from that volume.

27 7. The Court will also find citations to and quotations from pleadings that are
28 in the record of this case. Among them is a Government pleading (Doc 1364) that had as
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1 an exhibit FBI Special Agent Sparano's August 12, 2020 signed declaration pertinent to
2 her work on this case. I have made reference to one of the paragraphs from that
3 declaration, and I believe I have done so by quoting from it accurately.

4 8. I have also made reference to and characterized litigation conducted in
5 *United States v. Henry Cervantes, et al.*, Northern District Case No. 12-CR-00792-YGR.
6 I represented Mr. Cervantes in that case, and some of the cell phone evidence related
7 rulings produced in that case have been cited by several other District Courts. Two of
8 those rulings are pertinent to the issues presented here, and I believe that I have
9 accurately characterized the nature of the evidence presented in that case and the rulings
10 made. Of some importance to the Court's analysis in this case is the fact that in the
11 Henry Cervantes case, what CAST evidence there was pertained to calls initiated by one
12 handset in a particular geography on a given day. There was drive testing involved, and
13 the District Judge in that case required further information about the nature of the work
14 done in the case to be provided to the defense in response to one of the objections I
15 raised. See, generally, the unpublished ruling in *U.S. v. Cervantes*, 2015 U.S. Dist.
16 LEXIS 127048 (N.D.Cal, September 22, 2015). Judge Gonzales Rogers did admit the
17 opinion evidence in that case, which involved drive testing related analysis of the cell
18 tower likely to be accessed from a particular stretch of road in the East Bay.

19 9. On the issue of mapping programs and the use of ESPA software from
20 Gladiator Forensics, who has been identified to the defense by the Government as the
21 purveyor of mapping software used in this case. I have reviewed Gladiator's website and
22 have sought to print out some of the material. I have appended for use by the Court basic
23 printouts of what is advertised on Gladiator's website for its 'Wireless Network Forensics
24 Tools.' These are attached here as Exhibit C. I believe that some of the published rulings
25 that I reference in the appended Memorandum make reference to two of these software
26 packages, GAR and ESPA, both of which the Court will find mentioned in the appended
27 materials. The text pertinent to ESPA mapping specifically that is available from the
28 website reads as follows: "Enterprise Sensor Processing and Analytics is Gladiator's

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1 forensics geographic information system which seamlessly unifies case management,
2 data storage, and analytics from all of Gladiator's intelligence gathering and analytical
3 tools."

4 10. Based on the Government's disclosures to date, I have no idea what aspects
5 of Gladiator's other products may or may not have been used in the analysis done in this
6 case. I also do not know what version of ESPA was used, or what any of the actual
7 operating characteristics and algorithms associated with software are.

8 11. After the Government finally confirmed that Gladiator Forensics is
9 involved in this case, I used the form provided by Gladiator on its website to ask for
10 information about the Gladiator Suite. I correctly indicated that I am a lawyer in private
11 practice. I heard nothing in return. I also called the 202 area code number that Gladiator
12 Forensics posts on its website in regard to sales. I left my name and correct information
13 on a recorded line. There was no option to talk to a live person. The voicemail had no
14 information about other contact opportunities. I have not heard anything back from the
15 message left.

16 12. In the absence of an evidentiary hearing, given the paucity of actual raw
17 information and foundational information produced in discovery proceedings, and given
18 the lack of a report about drive testing to verify the historical cell site analysis as occurred
19 in *Cervantes*, I do not believe that there is a sufficiently explained foundation for the
20 Court to admit what I understand to be the breadth of the evidence that the Government
21 seeks to admit in this case through Special Agent Sparano.

22 13. If the Court is not inclined to grant the Wendt defense motion without a
23 hearing, I believe that the Court needs to hold a hearing to do fact finding in connection
24 with the CAST proffer.

25 I declare under penalty of perjury that the foregoing is true and correct, except as
26 to those matters alleged on information and belief, and as to those matters, I believe this
27 declaration to be true and accurate.

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1 Executed this 29th day of January, 2021, at San Francisco, California.

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3 /s/ John T. Philipsborn

4 Declarant
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PROOF OF SERVICE

I, Melissa Stern, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is Suite 350, 507 Polk Street, San Francisco, California 94102.

On January 29, 2021, I served the within document entitled:

DECLARATION OF COUNSEL IN SUPPORT OF MOTION TO EXCLUDE OR LIMIT THE TESTIMONY OF FBI OR OTHER EXPERT WITNESSES TESTIFYING ABOUT CELL PHONE COMMUNICATIONS AND LOCATIONS BASED ON HISTORICAL CELL CALL DETAIL RECORDS AND PROPRIETARY MAPPING SOFTWARE [DAUBERT AND F.R.E. 403]; MOTION FOR EVIDENTIARY HEARING [EXHIBITS ATTACHED]

- () By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;
- (X) By electronically transmitting a true copy thereof through the Court's ECF system;
- () By having a messenger personally deliver a true copy thereof to the person and/or office of the person at the address set forth below.

AUSA Kevin Barry
AUSA Ajay Krishnamurthy
AUSA Lina Peng

All defense counsel through ECF

Executed this 29th day of January, 2021, at San Francisco, California.

Signed: /s/ Melissa Stern
Melissa Stern

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